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PART V

# FEDERAL TRADE COMMISSION

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## OCTANE POSTING AND CERTIFICATION

### Establishment of Standard Procedures; Invitation for Public Comment

[6750-01-M]

Title 16—Commercial Practices

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS

## PART 306—OCTANE CERTIFICATION AND POSTING

AGENCY: Federal Trade Commission.

ACTION: Final Rule Governing Certification and Posting of Octane Numbers Under Title II of the Petroleum Marketing Practices Act.

SUMMARY: Pursuant to Title II of the Petroleum Marketing Practices Act (PMPA), the Federal Trade Commission issues a final rule that establishes standard procedures for determining, certifying, and posting, by means of a label on the fuel dispenser, the octane rating of automotive gasoline intended for sale to consumers. The rule is intended to enable consumers to buy a gasoline with an octane rating that is high enough to prevent inefficient and harmful "engine knock." The rule also is intended to help consumers avoid buying gasoline with an octane rating that is too high for their needs. The decline of this practice, known as "octane overbuying," could result in gasoline price savings to consumers, more efficient use of energy resources, and lower levels of air pollution from automotive exhaust emissions.

EFFECTIVE DATE: June 1, 1979.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

STATEMENT OF BASIS AND PURPOSE

I. INTRODUCTION

*A. Background*

On June 19, 1978, President Carter signed into law Public Law No. 95-297, entitled "The Petroleum Marketing Practices Act" (PMPA). One of the purposes of the Act, according to its preamble, is "to encourage conservation of automotive gasoline and competition in the marketing of such gasoline by requiring that information regarding the octane rating of automotive gasoline be disclosed to consumers."

To accomplish this purpose, Title II of the statute requires that the Federal Trade Commission promulgate a rule relating to octane rating disclosure. This rule was proposed by the Commission in a notice published in the FEDERAL REGISTER on September 22, 1978. The proposed rule prescribed:

(A) A uniform method of certifying the octane rating of automotive gasoline when it is transferred from refiner to distributor to retailer; and

(B) A uniform method of displaying the octane rating of automotive gasoline sold at the pump.(1)

This rulemaking was conducted in accordance with 5 U.S.C. 553, except that interested persons also were afforded an opportunity to present oral as well as written testimony.(2) Consistent with these requirements, hearings were held on October 16 and 17, 1978. Refiners, distributors, retailers, state agencies, standards setting organizations, and consumers participated in the proceedings.

The evidentiary record was closed on November 3, 1978. On December 26, 1978, the staff released its report, which contained an analysis of the evidence and recommendations for a final rule to the Commission. From then until January 22, 1979, the public had an opportunity to submit comments on the staff's report. On February 26, 1979, staff forwarded to the Commission a summary and analysis of the comments received, together with its final rule recommendations.

Based on the full record, the rule that the Commission is promulgating differs in certain respects from the proposed rule. This notice presents the rationale for each revision and sets forth the basis for each provision of the final rule.

*B. Purpose of Octane Disclosure*

All automotive gasolines have an octane number, or octane rating. This number is a measure of how well the gasoline will resist "knocking" in an engine. Engine knocking, which is caused by spontaneous combustion in localized areas of an engine, wastes power and lowers the effectiveness of the engine. Persistent or severe knocking can seriously damage the engine. Thus, the consumer should buy gasoline with an octane rating that is high enough to prevent engine knocking.

However, consumers should avoid "octane overbuying," that is, buying gasoline with more octane than their cars need. Higher octane gasolines usually cost more than lower octane gasolines, and consumers who buy more octane than is needed to control engine knock derive no benefits from the additional money they spend. The prevention of octane overbuying could have at least two other salutary effects. First, less octane overbuying can result in less use of energy resources needed to produce higher octane gasolines. Second, since gasolines with higher octane levels often contain substantial amounts of lead—a serious pollutant—less overbuying may reduce air pollution caused by lead emissions, a major environmental hazard.

For these reasons, consumers need to know, as accurately as possible, both the octane requirements of their individual cars and the octane ratings of the gasoline they buy at the dispenser. With this information, motorists simultaneously can conserve energy, save money, reduce air pollution, and protect their cars against possible engine damage.

*C. History of Octane Disclosure Regulation*

1. *Federal Trade Commission.* The Federal Trade Commission some years ago recognized the value of disclosure of octane ratings to gasoline consumers. On December 16, 1971, the Commission promulgated its trade regulation rule on the posting of octane ratings on gasoline dispensers.(3) In issuing this rule, the Commission found that the failure to disclose the minimum octane rating of gasoline constituted an unfair or deceptive act or practice and an unfair method of competition in commerce under the Federal Trade Commission Act. The responsibility for this disclosure rested on the refiner or distributor who owned or leased the dispenser. The rule specified that the method for determining the octane rating should be the (R + M) /2 formula.(4)

This rule never took effect. Following its promulgation, the National Petroleum Refiners Associations (NPRA) filed a legal challenge against the Commission's authority to issue the rule. The United States District Court for the District of Columbia held that the Commission lacked authority to promulgate trade regulation rules that had the substantive effect of law—that is, that could be enforced as though they had been acts of Congress. On appeal by the FTC, the United States Court of Appeals for the District of Columbia reversed, finding that the Commission possessed authority to promulgate substantive rules, and remanded the case to the D.C. District Court for further consideration limited to the adequacy of the administrative record underlying the rule.(5) On October 27, 1977, the District Court dismissed NPRA's action without prejudice, but ordered the Commission to complete an environmental impact statement before attempting to put the rule into effect. Since this statement has not been completed, the rule has never taken effect.(6)

During its consideration of Title II of the PMPA, Congress recognized that prolonged litigation had prevented enforcement of the original octane posting rule. It is evident from the statute, and its legislative history,(7)

that Congress intended the requirements of Title II to replace those of the Commission's original octane posting rule. For example, the octane rating method specified by section 202(c) of the Act is the same as the method that was required by the 1971 rule.

Enactment of the PMPA thus effectively repealed the octane posting rule.(8) On September 22, 1978, the Commission published an announcement of the rule's repeal in the FEDERAL REGISTER at 43 FR 43022.

2. *Federal Energy Administration.* The Federal Energy Administration (FEA), subsequently incorporated as part of the Department of Energy (DOE), also has acted to require octane disclosures to consumers. In exercising its price control authority under the Emergency Petroleum Allocation Act of 1973, FEA concluded that a reduction in the octane rating of gasoline without a corresponding reduction in price was tantamount to an increase in price for the gasoline. As part of its pricing regulations addressing this problem, FEA required that octane ratings be posted on all gasoline pumps.(9)

Congress was aware of this regulatory effort when it considered passage of the PMPA. The Senate Report refers to the FEA rule, noting the requirements of the FEA regulation have not been actively enforced. The Report also states that, absent a legislative directive, the prospect of more active federal enforcement of an octane posting rule appeared unlikely.(10)

Thus, Congress instructed the FTC to promulgate an octane posting rule "to assure prompt and permanent enforcement of an octane posting requirement."(11)

### *D. Requirements of Title II of PMPA*

In addition to providing a distinct statutory basis for an octane posting rule, Congress sketched out the contours of the rule.

Refiners(12) must determine and certify ratings to their distributors.(13) Distributors(14) are required to certify octane ratings to other distributors and to retailers.(15) Gasoline retailers(16) must display, "in a clear and conspicuous manner at the point of sale," the certified octane rating of the gasoline being dispensed.(17)

Refiners are required to determine the octane ratings of their products in accordance with a stated formula.(18) The formula provided in Title II is the sum, divided by two, of the Research Method and the Motor Method, two accepted laboratory test methods for evaluating the antiknock performance of automotive gasoline.(19)

The Research Method measures anti-knock performance under mild operating conditions, that is, at relatively low engine speeds with a wide open throttle. In practice, these conditions would exist for most passenger cars and light-duty commercial vehicles during periods of full-throttle operation for all but the most severe conditions.(20)

The Motor Method measures antiknock performance under more severe operating conditions, that is, at relatively high engine speeds with a wide open throttle. These conditions would exist for many passenger cars and light-duty commercial vehicles during periods of power accelerations at higher road speeds, such as in passing vehicles or in ascending hills.(21)

Neither of these methods, standing alone, produces a completely accurate measurement of the octane rating of automotive gasoline.(22) As a result, a standard practice is to add the octane numbers derived from both methods and divide that sum by two to get the "anti-knock index" of the gasoline. This formula—(R + M)/2—is recommended by the American Society for Testing and Materials (ASTM),(23) and was adopted in both the Commission's 1971 rule and FEA's 1973 rule.

Although Congress reaffirmed this method in the PMPA,(24) there is continuing debate in the industry concerning other, arguably more precise, ways of determining octane ratings. Congress was cognizant of this debate, and provided that the Commission could, by rule, prescribe a different procedure for determining octane ratings.(25)

### *E. Summary of Rule Provisions*

1. *Coverage and Penalties.* So that it may be easily used by industry members, the rule itself is divided into sections based on category of industry membership (such as refiner, distributor, retailer). One final section details label specifications. However, in order to avoid repeated discussion of duties commonly shared by different categories of industry members, this summary, as well as the analysis to follow, is divided by headings reflecting the various requirements of the rule; for example, certification, labels, recordkeeping, posting.

The rule covers refiners, producers, importers, distributors and retailers of automotive gasoline.(26)

Section 306.0 of the rule states that violations of the rule are punishable by fines of up to $10,000 per day for each violation, in accordance with the terms of liability set forth in section 5(m)(1)(A) of the Federal Trade Commission Act.(27)

2. *Octane Determination* There are three ways in which industry members may determine(28) the octane of gasoline for purposes of certification or posting. They are: testing, by means of the prescribed (R + M)/2 formula; mathematical calculation using the prescribed weighted-average formula; or, using the lowest octane rating certified for any of the gasolines in a blend.

Section 306.4(a) of the rule states the statutory requirement(29) that refiners, producers and importers must determine the octane of the gasoline they distribute. These industry members may use their own laboratories or contract with outside laboratories. Tests using the (R + M)/2 formula are to be conducted in accordance with procedures developed by the American Society for Testing and Materials (ASTM), a voluntary standards-setting organization.(30)

If distributors(31) and retailers(32) do not blend gas, they have the option of using the octane rating certified to them or of determining the octane rating by testing in accordance with the (R + M)/2 method.

If distributors or retailers blend different gasolines, they have the option of: 1) determining the octane rating by testing in accordance with the (R + M)/2 method; 2) using the lowest octane rating certified to them for any of the gasolines in a mixture; or 3) using the weighted-average formula prescribed by § 202(f)(1) of PMPA.(33) Under the weighted-average formula, an industry member takes the average of the octane ratings, weighted by volume, of the gasolines in the blend in order to arrive mathematically at an octane rating for the mixture.

3. *Certification of Octane Rating.* The Rule requires that refiners,(34) producers and importers(35) and distributors(36) certify the octane rating of gasoline that they transfer for resale. This certification can be accomplished in either of two ways: on a delivery ticket(37) or by a letter or other written statement.(38)

Certification on a delivery ticket, which can be any written proof of transfer, must show the names of the parties to the transfer, the date, and the quantity and octane rating of the gasoline.

A letter of certification from the supplier to the next person in the chain of distribution must show the names of the parties, the date, and the octane rating of the gasoline to be transferred. This type of certification is valid until gasoline with a lesser octane rating is shipped. In effect, it is an on-going certification of a minimum octane rating. In both of the above methods of certification, the octane rating may be stated as a whole or half number either equal to or less than the determined rating, or as an exact, fractional rating.(39)

4. *Posting.* Retailers are required to post the octane rating of all gasoline that they sell to consumers.(40) They

must post a whole or half number equal to or less than the octane rating certified to them or determined by them.(41) They must post at least one label on each face of each gasoline dispenser, and if more than one kind of gasoline is sold from a single dispenser, separate disclosures for each kind of gasoline must be put on each face of the dispenser.(42)

The label must be put on the face of the dispenser as near as possible to the price per gallon of the gasoline. It must be placed so it is in full view of consumers.(43)

Retailers must maintain and replace labels as needed to make sure that consumers can easily see and read them.(44) If labels are defaced or are unusable for some unexpected reason, retailers may post a temporary label.(45)

5. *Labels.* The standard labels are 3 inches wide and 2½ inches long.(46) The size(47) and type style,(48) as well as dimensions for border and spacing,(49) are specified. Labels are to be printed in black ink on a yellow background with a black border.(50) They must be capable of withstanding extremes of weather conditions for a period of at least one year.(51) They must be resistant to gasoline, oil, grease, solvents, detergents, and water.(52) Illustrations of label prototypes are included in the rule.(53)

The label must show the octane rating, using a whole or half number,(54) preceded by the words "MINIMUM OCTANE RATING" and "(R + M)/2 METHOD".(55)

6. *Recordkeeping.* Refiners,(56) producers,(57) importers,(58) distributors,(59) and retailers(60) must keep for one year records of any delivery tickets, letters or tests upon which they based the octane rating that they certified or posted. These records must be open for inspection by Federal Trade Commission staff or by other authorized persons.

7. *Preemption.* The rule recites the preemption language found in PMPA.(61) Pursuant to PMPA, the Commission intends this section to preempt any provision of any local or state regulation that is not the same as an applicable provision of the rule.(62)

## II. REQUIREMENTS OF THE RULE

This section discusses each provision of the final rule, and explains changes in the rule that have been made in response to the record evidence received in this proceeding.

### *A. Prefatory Provisions of the Rule*

1. *Jurisdiction.* Section 306.0 states that the rule deals with the certification and posting of octane ratings of gasoline in or affecting commerce, as defined in the Federal Trade Commission Act. The rule applies to persons, partnerships, and corporations. Section 203(e) of Title II of PMPA specifies that a violation of the rule shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 5 of the Federal Trade Commission Act. Accordingly, the penalty provisions of the FTC Act(63) are applicable and a violator of this rule can be fined up to $10,000 for each violation.

2. *Coverage.* Section 306.1 states that the rule covers refiners, producers, importers, distributors, and retailers. This coverage parallels the coverage in PMPA's definitions of "refiner,"(64) "gasoline retailer,"(65) and "distributor."(66)

The recommended rule accompanying the Staff Report extended coverage to those who took custody of gasoline, as well as those who took title, in order to preserve an unbroken chain of certification of the octane rating from refiner or importer to retailer.(67) As a result, common carriers fell within the scope of the recommended rule. This language has been deleted. In its place, the Commission has chosen to create an incentive for compliance by the common carrier in the octane certification framework. This has been accomplished by a provision that requires industry members to tender certification documents to, and receive certification documents from, common carriers in the chain of distribution. This provision encourages the distributor or retailer to obtain receipt of the shipping document and should induce the carrier to receive and then hand over the certifying document. The Commission believes that common carriers will voluntarily pass on the certifications they receive as they play their part in the chain of gasoline distribution. However, Commission staff will monitor the performance of common carriers in this regard. If it appears that common carriers are a significant cause of breakdown in the certification scheme, the Commission will take such action as it deems appropriate. As one step towards this end, the Commission has initiated contact with those agencies that have primary jurisdiction over common carriers. If necessary, the Commission will obtain assistance from those agencies to assure that common carriers carry out their role in the certification process.

Comments raised the question whether PMPA and the Commission's rule properly could cover "gasoline producers" as well as "refiners." The Environmental Protection Agency recommended that the requirements of the rule should apply equally to producers, refiners, and distributors.(68) Producers comprise that proportionately small segment of the industry that purchases gasoline components and produces gasoline without refining it from crude oil. If gasoline producers are excluded from the rule, the gasoline they sell would not be subject to the octane certification and posting requirements of the rule and statute. As a matter of policy and law, the Commission believes this anomalous result would satisfy neither the purposes nor the intended coverage of Title II of PMPA. In light of the congressional mandate for comprehensive coverage of all segments of the industry, the Commission thus believes that all industry members who "produce" gasoline—whether as independent producers or as refiners—should be covered by the rule. Section 306.1 of the rule has been drafted accordingly.

Because of the limited number of comments received regarding the necessity for including producers, the Commission will accept comments for thirty days from the date of publication of this rule regarding its decision to include this industry group in the rule.

3. *Severability of the rule.* Section 306.2 states that if any one of the rule's provisions is stayed on appeal or held invalid, the other provisions will remain in effect.

4. *Preemptive effect of the rule.* Section 306.3 of the rule quotes Section 204 of PMPA:

> To the extent that any provision of this title applies to any act or omission, no state or any political subdivision thereof may adopt, enforce or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to such act or omission, unless such provision of such law or regulation is the same as the applicable provision of this title.

The Commission interprets this language to mean that the rule preempts any provision of any state or local regulation in this area that is not the same as an applicable provision of this rule. (69)

### *B. Substantive Provisions of the Rule*

1. *Octane Determination.* Section 202(a) of PMPA requires each refiner who distributes automotive gasoline in commerce to determine the octane rating of the gasoline. The formula to be used in determining the octane rating of gasoline is prescribed by section 201(1) of PMPA, which defines octane rating as "* * * the rating of the anti-knock characteristics of a grade or type of automotive gasoline as determined by dividing by 2 the sum of the research octane number plus the motor octane number * * *" In section 201(2) of PMPA, Congress derived the terms "research octane number" and "motor octane number" from Standard Specifications for Automotive Gasoline, D 439, a specifi-

cation of the American Society for Testing and Materials (ASTM). Gasoline octane ratings are to be determined in accordance with test methods set forth in ASTM standards numbered D 2699 and D 2700, as in effect on the date of enactment of PMPA. (70)

Based on its interpretation of section 201(2) of PMPA, the Commission has concluded that Congress intended the versions of the ASTM standards in effect in June of 1978 to be adopted, and that any subsequent change in the ASTM standards should not become a part of the rule until affected members of the public have had notice of the change and an opportunity to comment. (71) Therefore, section 306.4 provides that ASTM updates be automatically incorporated into the rule after expiration of a 30-day comment period and a 60-day grace period, except when an update constitutes a change in the procedure for determining the octane rating. Under this section, the Commission will publish notice of the new version in the FEDERAL REGISTER and allow 30 days thereafter for interested persons and Commission staff to comment on whether the revision constitutes a change in the octane determination procedure and whether a 60-day grace period is sufficient time for compliance. On the basis of comments received, the Commission will make a determination as to whether the amendment to the ASTM test method changes the procedure for determining octane ratings. If the Commission decides that the procedure is changed, the change will not be incorporated automatically in the rule. Rather, the Commission will consider the change in an "on the record" rulemaking proceeding consistent with the requirements of section 203(d)(2) of PMPA.

If, after analyzing the evidence submitted during the 30-day comment period, the Commission determines that the amendment to the ASTM test method does not constitute a change in the procedure for determining octane ratings, the ASTM revision will be automatically incorporated into the rule. This incorporation will be effective at the expiration of the 60-day grace period. The 60-day grace period, which begins after the expiration of the 30-day comment period, is to afford affected persons adequate time to come into compliance with the changes to be incorporated into the rule. Industry members will be invited to comment, during the 30-day comment period, on whether a 60-day grace period will be a sufficient length of time in which to prepare for the change. If comments indicate that it would not be, the Commission will have the discretion to extend the grace period.

The Commission believes that this incorporation scheme in § 306.4 of the rule achieves the administrative objectives of flexibility and efficiency, while also providing adequate procedural safeguards for affected persons, as intended by section 203(d)(2) of PMPA.

a. *Testing.* The rule repeats the PMPA requirement that refiners "determine" the octane rating of their products. (72) In so doing, it reflects the intent of Congress that refiners not be strictly obligated to test, but may also refer to earlier experience and data while either conducting occasional spot tests for quality, or monitoring through on-line testing to assure consistency of octane rating. (73) The rule also states that refiners or importers may use private facilities for octane determinations. This is important to small refiners, who often do not have octane testing equipment of their own. (74)

Under Sections 202(b)(2) and (c)(2) of PMPA, distributors and retailers may elect to determine octane ratings themselves. Under the statute, the Commission has authority to promulgate a rule prescribing the time and manner for determination of octane ratings by industry members. (75) The procedures to be followed in such a rulemaking are intended to be the same as those that were followed in the instant rulemaking. (76)

The evidence on the record indicates that, generally, neither distributors nor retailers engage in testing of octane ratings because of the cost of equipment and tests. (77) For example, the current cost of one of the test engines used in determining octane ratings, exclusive of operating costs, is approximately $25,000. The cost of having one test run by a commercial laboratory is estimated at between $70 and $100. Furthermore, there are no simple field procedures at this time that can be used by distributors or retailers in place of the complex methodology required of refiners under the prescribed ASTM methods. There are few knock test facilities other than those of refiners, government, independent laboratories, and some suppliers of antiknock additives.

The limited instances of testing mentioned on the record occur when large-scale distributors blend gasoline. The National Oil Jobbers Council commented that pipeline operators that have octane level standards of their own are able to test and certify the large quantities of gasoline that they commingle from various sources. (78)

Several comments suggested that testing by distributors or retailers should be permitted when different gasolines are mixed or blended. Shell Oil suggested that although blending is rare, a distributor of blends should have the option of testing in order to post an accurate octane figure. (79) Union Oil agreed, (80) noting that when large terminals mix gasoline, they should be able to test, rather than being required to use the weighted-average formula prescribed by section 202(f)(1) of PMPA. (81) Such testing would be appropriate, however, only if it were done either by a recognized laboratory or under the guidance of a trained employee.

Additionally, because of certification problems that can arise when a supplier uses a common carrier pipeline, the record indicates that octane testing by the pipeline, or terminal operation at the point of extraction from the pipeline, would be desirable. (82)

In contrast, wholesalers do not currently test or wish to conduct tests for the purpose of certification. (83) Moreover, two comments suggested that non-refiner's testing should be prohibited, since the high cost of equipment and lack of experienced personnel make it unlikely that competent tests can be run at the distributor or retailer level. (84)

In sum, the record shows that distributor and retailer testing normally occurs only when gasoline is blended. Because the evidence demonstrates that proper octane testing is too complex and too expensive for most retailers and distributors, the Commission has determined not to impose a testing requirement on these industry members. Rather, the rule, consistent with 202(b)(2) and (c)(2) of PMPA, permits distributors or retailers to test to determine octane ratings for either certification or posting purposes. If distributors or retailers test for octane ratings, the Commission considers it imperative that the tests be of comparable quality to those run by refiners. Therefore, all tests must conform to the ASTM standards mentioned in § 306.4 of the rule. (85)

b. *Weighted-average Formula.* Section 202(f)(1) of PMPA prescribes distributors' use of the weighted-average formula for determining the octane rating of a gasoline consisting of a blend, or mixture, of two or more gasolines with different octane ratings. To use this formula, the industry member calculates mathematically the octane rating of the mixture by averaging the ratings of each gasoline in the mixture after assigning a proportionate weight, based on volume, to each. Section 203(c)(4) of PMPA authorizes the Commission to prescribe a method other than the weighted-average method if it determines that such method more accurately reflects the octane content of the blend.

While the record evidence(86) supports use of the weighted-average formula when leaded gasoline is blended only with leaded, or unleaded with unleaded, it shows that some variation

occurs on those rare occasions when leaded and unleaded gasolines are combined.(87) With gasolines of the same composition, the relationship between the octane ratings is linear. However, when leaded and unleaded gasolines are blended, the actual octane level of the blend will be slightly higher than that reflected by use of the weighted-average formula.

Chevron commented that there is a more accurate method than the weighted-average formula for calculating the octane level when there is a difference in the lead levels between gasolines mixed. However, this method would require measuring the lead in each of the gasolines in the mixture and graphing a lead response curve, and Chevron itself pointed out that it would be too complicated a method for regular use.(88)

Moreover, some comments supported use of the weighted-average formula even for mixtures of leaded and unleaded gasolines. Those comments stressed that the weighted-average formula, although not perfect, is the best practical formula available. Further, to the extent that the result with this formula is imprecise, the error will result in consumers obtaining a slightly higher, rather than a lower, octane than they expect.

Exxon proposed use of empirical data developed for specific blends, instead of use of the weighted-average formula.(89) The Commission cannot accept this proposed change. The suggestion is not supported on the record, and the Commission thus has insufficient information upon which to base a decision to allow the use of this method.

Atlantic-Richfield raised a concern regarding possible distortions resulting from using the weighted-average formula in conjunction with possible certification of octane ratings to the next lower whole number. As discussed in section B, 2, *infra*, the Commission is permitting refiners and distributors the option of certifying to a whole or half number, or certifying to tenths, thereby providing a means of avoiding distortions that could result from the use of the weighted-average formula in connection with minimum whole numbers.

The Society of Independent Gasoline Marketers of America (SIGMA) indicated that SIGMA's members, both wholesalers and retailers, often receive daily deliveries from their suppliers. The variation in the octane rating of these deliveries can be as much as three points from one delivery to the next.(91) Determining the octane rating of the resulting mixtures would require continuous mathematical calculations. For retailers, this variation could result in frequent changes of the posted labels. Moreover, according to SIGMA, use of the weighted-average formula requires a mathematical calculation that will be difficult to compute.

In contrast to these comments, many participants perceived no practical problems with using the weighted-average formula. The National Oil Jobbers Council, for example, commented that many wholesalers and retailers are already determining octane levels by voluntarily using the weighted-average calculation.(92)

As previously noted, PMPA authorizes the Commission to change the weighted-average formula if another method is found to reflect more accurately the octane rating of gasoline mixtures.(93) The Commission realizes that use of this formula may result, in those occasional situations where leaded and unleaded gasolines are blended, in slight octane overbuying. However, upon reviewing the record on this issue, the Commission has been unable to find sufficient evidence to justify the adoption of any formula other than the weighted-average formula for determining the octane rating of blended gasolines. Furthermore, the Commission is concerned with the implications, both in terms of accuracy and burden on the industry, of adopting a new method based on the limited evidence on the record. Consequently, the Commission has retained this statutorily-prescribed formula as one of the optional methods available to distributors or retailers who mix gasolines. The other options permitted under the rule are testing, or certification and posting of the lowest octane of the gasolines in the blend.(94)

c. *Lowest Octane in Mixture.* To allow for those situations in which a distributor or retailer receives several different shipments of gasoline, each of which has an octane different from the others by only a few tenths of one point, the rule gives the industry the option of certifying or posting the octane of such mixtures to the octane rating of the gasoline in the mixture having the lowest octane. (§§ 306.8(a) and 306.11(c)). This third option, which requires no mathematical calculation, may provide the same result would be derived from either the weighted-average formula option, or the option to test, but will be considerably simpler to use.

2. *Certification.* PMPA requires all refiners,(95) producers and importers(96) and distributors(97) to certify the octane rating of gasoline that they distribute in commerce for resale. Refiners must certify consistent with their determination of the gasoline's octane. Distributors must certify consistent with the certification they received or, optionally, the octane rating determined by them.(98)

Section 306.10 of the proposed rule required octane certification by refiners, importers and distributors to be accomplished by including a delivery invoice with each transfer of gasoline for resale. The proposed rule(99) defined "delivery invoice" as a document in the form of an invoice, bill of lading, bill of sale, a terminal ticket, delivery ticket or any other written evidence of transfer. The invoice had to include:

1. The name of the person who is transferring the gasoline and the name of the person to whom the transfer is made;
2. The date of transfer;
3. The quantity of gasoline transferred;
4. The octane rating of the gasoline;
5. The signature of the person who is transferring the gasoline; and
6. For refiners and importers, the statement: "I certify that the octane rating specified on this delivery invoice is consistent with my determination of the octane rating." For distributors, the statement ends with "* * * consistent with the octane rating on delivery invoice or invoices which accompanied the transfer of this gasoline."(100)

No information inconsistent with the above requirements was permitted on the delivery invoice.(101)

a. *An Invoice with Every Transfer.* Several comments(102) expressed the opinion that delivery practices within the industry make it difficult, if not impossible, to comply with the requirement to certify the octane rating on a document accompanying each shipment of gasoline. This is because many transfers made within the chain of distribution have no documentation accompanying the delivery, although a delivery ticket or loading ticket will sometimes accompany transfers made during the normal terminal loading transaction.(103) In addition, much of the gasoline sold by a refiner is actually delivered by other refiners pursuant to exchange agreements. The record also indicates that many deliveries of gasoline are made at completely automated distribution terminals, where it is impractical or impossible to require a certification document.

In contrast, some comments stated that documentation normally accompanies delivery, and that the proposed rule's certification requirement thus would not be unduly burdensome. For example, Union Oil Company of California stated that delivery invoices or tickets accompany transfers and contain the name of the company, the customer's name, the gross gallons loaded, temperature at loading, equipment number, price, extended price, a statement about the hazardous nature of the substance and tax notices. Intracompany transfers are accompanied by a simpler invoice.(104)

In the state of Maryland, all transfers of gasoline must be accompanied by an invoice, showing the name of

the carrier, gallons, date, place and time loaded, name of facility where loaded and the ultimate consignee. The objective is to provide the state with an audit trail for tax purposes.(105)

A few industry members commented that although the information required by the proposed rule already appears on delivery documents as a matter of business practice, the requirements are, nevertheless, unnecessarily specific.(106) The consensus industry opinion with respect to the requirement of a delivery document containing a certification for every gasoline transfer is that delivery points are so numerous and the types of operations so varied, that attempting to control the issuance of a proper document in each instance of a motor fuel delivery is unrealistic.

In order to provide an alternative to the proposal of including an invoice with every transfer of gasoline, several industry members suggested that refiners and distributors be allowed to certify on an on-going basis by means of a letter. Such a letter to their customers would guarantee the minimum octane rating of one or more grades of gasoline. The supplier/refiner would be obligated to notify customers of any change in the octane rating. This proposal was supported by retailers, as well as refiners.(107)

The Commission has concluded that the certification requirements of PMPA could be satisfied by such a method, and the rule thus has been revised to provide an option for certification on a continuing basis by a single letter or other document, as an alternative to requiring that certifying documents accompany each transfer of gasoline. Section 306.5(b) provides that the letter of certification will be good until a transfer of gasoline with a lower octane rating is made. This option, in effect, allows certification to a minimum octane rating, which is consistent with current industry practice in many cases.

b. *The Contents of the Invoice.* Sections 306.10(a)(6) and (b) of the proposed rule specified precise certification language for the invoice.(108) The State of Maryland supported this requirement.(109) However, some comments preferred less specificity, arguing that the certification disclosure would be more workable if it were changed to be a simple statement of the minimum octane rating of the gasoline transferred.

Section 306.10(a)(5) of the proposed rule required the invoice accompanying each transfer of gasoline to bear the signature of the person transferring the gasoline. Some industry members stated that transfers of gasoline often take place under conditions in which no one is present to sign a document, or where the person would not be the appropriate person to sign. Such circumstances usually occur in automated delivery situations. The result of requiring manual signatures could be severe disruption of existing industry distribution practices and increased cost to consumers.(110)

In place of the proposed signature requirement, some industry members suggested use of a preprinted corporate signature.(111)

In response to these comments, the Commission has modified the proposed rule so it requires a simple certification of the octane rating, rather than formal certification language, and no signature.

3. *Posting.* Section 306.20 of the proposed rule directed each retailer to display the octane rating by posting labels on gasoline dispensers. The label was to be affixed to the face of the dispenser, where the price per gallon and price of purchase appear. For gasolines with different octanes sold from a single dispenser, there would have to be a separate label for each different gasoline.

a. *Label Placement.* Significant concern was expressed about the ability of retailers to post the required label in immediate proximity to the number representing the price per gallon, as required by § 306.2(a)(3) of the proposed rule. This concern focused on the placement, rather than the size, of the label. Comments frequently mentioned the existence of new designs in dispensers.(112)

Two comments noted that the final rule should clarify the requirement that at least one label on each gasoline dispenser face be visible to consumers, since most dispensers have at least one face plate on each side of the service island. (113)

The Commission considered recommending different, but specific, location for the label to maintain uniformity. However, no consensus emerged in the record for another appropriate location. Given diverse dispenser designs, it is unlikely that there is a single, consistent location, highly visible to consumers, on which a 2½-inch by 3-inch label can be placed. Moreover, the Commission has concluded that uniformity in placement of the label is secondary to the conspicuousness of the label's location. Finally, the Commission has considered coupling the proposed placement requirement with the intent to consider specific exceptions on a case-by-case basis. However, because of the numerous pump designs being created and marketed, such an approach could lead to each new design having to be the subject of a request for an exception.

Consequently, the rule allows posting "as near as reasonably practical"(114) to the price per gallon. This provision is flexible enough to encompass future developments in dispenser design, although the label still must be conspicuously on each face of the dispenser so that it is in full view of consumers. The Commission expects this provision to keep petitions for exemption to a minimum, and intends to evaluate individual cases of inability to comply with the placement requirement in its routine enforcement of the rule.

b. *Maintenance of Labels.* The Commission has retained the proposed rule's provision regarding the obligation of retailers to maintain the labels and replace them as needed.(115) The rule does not specify a time at which labels must be renewed. The Commission does not believe that there is evidence on the record to suggest that any specific time period is appropriate. Renewing of labels is left to the retailers' discretion as long as the label is easily readable by consumers.

4. *Labels.* a. *Content and Appearance.* Under the proposed rule, the label was to contain the octane rating certified to the retailer by the distributor or refiner, or, if the retailer blended the gasoline, the octane rating determined by use of the weighted-average formula.(116) The proposed rule required the octane rating to be expressed as a whole number. The posted labels were to contain the minimum octane rating number, and the words "MINIMUM OCTANE RATING" and "UNDER FEDERAL LAW."(117)

Section 306.21 of the proposed rule enumerated specifications for the proposed label. The label was required to be 3 inches wide by 2½ inches long. An illustration of the label, demonstrating the proper layout, was also included in the FEDERAL REGISTER notice. Large numerals, in 96-point bold type face, represented the octane rating. The proposed rule also prescribed a uniform color scheme for all labels, yellow with black type and borders.

i. *Octane Rating on Label.* The rule gives refiners and distributors the option of either certifying to a whole or half number equal to or less than the number determined by them or certified to them, or certifying to a fraction. This option is addressed primarily to those situations in which the industry currently certifies to tenths, or in which it is known that gasoline will be blended. Retailers do not have this option and must post minimum half numbers—that is, they must post to a whole or half number equal to or less than the number certified to them or determined by them.

Comments suggested numerous alternative methods of posting octane. These included posting to tenths, to half numbers or to whole numbers, rounding up to the next whole or half

number, or allowing a tolerance of two points in either direction from the posted number.(118)

Section 306.11(c) of the recommended rule accompanying the staff report required retailers to post minimum whole numbers. Staff concluded that this method recognized the inherent, slight imprecision in the octane testing method itself as stressed in the record.(119) Posting to tenths, staff believed, would imply a precision that simply does not exist. Staff also believed that the posting of minimum whole numbers would take into account changes that could affect octane ratings while the gasoline is in the distribution network.(120)

The Commission believes, however, that the aims of preventing octane overbuying and furthering energy conservation would be better served by allowing the posting of minimum half numbers at the discretion of retailers. Several comments stressed that requiring the posting of minimum whole numbers could result in refiners having no incentive to make gasoline improvements in one-half octane number increments. Others argued that the octane levels of all grades might be reduced, and that consumers whose automobiles required octane of a level between whole numbers would have to go to the next higher whole number to avoid engine knock, thus overbuying by one half of an octane point.(121)

Section 306.9(c) of the final rule, therefore, provides that retailers must post octane ratings in terms of a whole or half number equal to or less than the octane rating certified to them or determined by them.

ii. *Other Information on Label.* One comment suggested that the proposed language "UNDER FEDERAL LAW/ MINIMUM OCTANE RATING" might lead consumers to believe that the specific octane level of that gasoline is in some way prescribed by the federal government.(122) The Commission believes this impression would be misleading. Therefore, the language, "UNDER FEDERAL LAW" has been eliminated from the label.

Some comments suggested that the formula used for deriving the octane rating be included on the label. It was urged that in the absence of this formula, consumers may not realize that the (R+M)/2 formula, rather than the RON formula, was being used. The Commission believes that knowledgeable consumers would understand that RON was no longer being used if they saw the (R+M)/2 formula posted on the dispenser, so the formula is stated on the label as "(R+M)/2 METHOD."

In issuing the proposed rule, the Commission indicated concern about the effect of posting the (R+M)/2 octane rating when many consumers are presently more familiar with the research octane number (RON). This concern took the form of a question in the FEDERAL REGISTER notice regarding the number of cars with owners' manuals presently showing the RON number, rather than the (R+M)/2 number. Responsive comments indicated that between 70% and 80% of cars now on the road have manuals with either RON numbers alone, or no numbers. The Center for Auto Safety suggested that the RON equivalency rating should be posted on the label along with the octane number derived by the (R+M)/2 formula. This RON rating would be for owners of cars bought before 1975, some manuals of which gave octane requirements in terms of RON.(123) Opposition to this proposal emphasized that giving consumers the option of continuing to use the RON rating could prevent them from learning to use the new, uniform rating system.(124)

A question on the feasibility of including, on labels, a table converting RON ratings to (R+M)/2 ratings appeared in the FEDERAL REGISTER notice.

Most comments regarding such a conversion table indicated that a reliable table for converting the RON rating to the (R+M)/2 rating does not exist. The Maryland octane posting program, however, does make a limited conversion table available to consumers by means of a leaflet distributed through retail gasoline stations.

The final rule excludes both the RON equivalency rating and the conversion table from the required posting at gasoline dispensers. The Commission's decision to exclude a conversion table from the label is based on record evidence that it may not be possible to develop a reliable table, and that consumers would not be able to make adequate use of such a table if it were available.

With respect to posting the RON number, the Commission believes that adding the RON equivalency to the label would tend to reinforce whatever consumer confusion presently exists regarding these numbers. Additionally, the extent of current consumer confusion between RON numbers and (R+M)/2 numbers depends on how many pre-1975 owners' manuals provided RON numbers, and how many consumers still rely on pre-1975 manuals that contain RON numbers. The record is only partially helpful here, since the figures submitted by the Center for Auto Safety are already somewhat out of date. Yet, although the record is not complete in this area, the Commission believes that the problem of confusion is a diminishing one. First, in cases in which there is no disclosure of a RON number, there will be no confusion. Second, new cars are continuously replacing the pre-1975 models.(125) Since promulgation of the FEA octane rule, discussed at I, C, 2, *supra*, more manuals that disclose octane requirements have begun to make the disclosures in terms of (R+M)/2. Third, and last, the Commission believes that educational efforts, including those of consumer groups, governmental agencies and the press, will be effective in substantially dispelling consumer confusion. Posting the RON rating on labels could have the opposite effect and, thus, be counterproductive.

Moreover, the Commission concurs with comments that consumers may not read additional information posted on the dispensers. The required label, therefore, contains the following elements: The octane rating expressed as a minimum whole number, and the words "MINIMUM OCTANE RATING," and "(R+M)/2 METHOD." The Commission believes that this information conveys the essential information regarding the octane rating without confusing consumers or overburdening the industry.

b. *Label Specifications.* Since the labels will be posted on the outside of gasoline dispensers in many cases, it is expected that they will have to withstand all types of weather, as well as contact with gasoline, oil and other solvents. For this reason, Section 306.21 of the proposed rule included specific requirements for paper stock and special label protection.(126)

Because the Department of Energy and some states(127) already require gasoline posting, there has been some experience in developing appropriate labels. The National Congress of Petroleum Retailers noted many problems with existing labels. The same label is often used for posting both the price and octane rating. Since the ceiling price changes regularly, handwritten changes are frequently made to keep the labels current. Also, these labels have a very short life span because the numbers dissolve, for example, when the dispenser is washed. NCPR commented favorably on the specifications for the proposed label aimed at withstanding weather-related problems.

Maryland requires posting of the octane number on retail dispensers. It specifies the use of mylar-coated labels, similar to those required by the proposed rule. The State chose this feature so the labels would better withstand harsh weather elements. The State emphasized the longevity of its labels.(128)

The proposed specifications required all labels to be able to withstand extreme weather conditions for at least 1 year. Texaco commented that, based on experience with state and DOE requirements, no available label can meet this requirement.(129) Another

comment suggested that the label specifications be changed to a performance requirement, namely, that labels should be able to last for a 3-year exterior life and be solvent resistent.(130)

Mobil stated that self-adhesive polyvinyl chloride with a mylar coating is adequate for older dispensers, but not for the newer ones with the baked enamel finish on the dial face. Permanent adhesives cannot be removed from these dispensers without substantial damage to the finish. Mobil recommended using high-quality preprinted magnetic labels with mylar coating. (131)

Amoco suggested that the color scheme of black lettering on a yellow label be changed to any contrasting colors, at the company's option, so as not to conflict with corporate color schemes.(132)

Comments generally supported the concept in the proposed rule that labels be weather-resistant. The final rule requires that the label be capable of withstanding weather conditions for a period of at least 1 year. The Commission believes that the 1-year period for label performance is sufficient. The rule also retains the proposed uniform color scheme to help consumers identify the label. The paper stock, lamination and adhesive specifications in §§ 306.14 (d) and (f) of the recommended rule have been dropped. The Commission believes the foregoing performance standards are specific enough to assure compliance, while allowing the industry sufficient flexibility to obtain complying labels at a competitive price.

5. *Supply of Labels.* Section 306.22 of the proposed rule required labels to be supplied to gasoline retailers by the person who determines the octane rating of the gasoline. Failure to supply labels did not excuse retailers from their duty to post the octane rating. Question #6 of the Commission's September 22, 1978 FEDERAL REGISTER notice raised the issue of how such labels should be made available; whether the label should be provided without charge, or at cost; and whether there were better alternatives, such as retail dealer associations, for providing labels.

One comment argued that the certifier of the octane rating should supply the labels, because retailers would not know the octane of the gasoline they were receiving until the documentation or certification letter accompanying the shipment of gasoline was available. Consequently, retailers would need to procure and have available posting stickers for all octane levels that the retailers might sell. The adverse impact on small gasoline retailers would be disproportionately greater than on refiners or distributors. It would be cheaper for the retailers to bear the cost of the labels by reimbursing the refiners or the distributors who supply them with labels, since the latter will buy in bulk and, hence, obtain a lower unit price.(133)

Other comments, primarily retailers, also opposed a requirement that retailers supply labels. One stated that labels should be made available to all gasoline retailers by a federal agency designated by the Commission at offices located throughout the United States.(134) Two refiners indicated that distributors should be responsible for securing their own supplies of decals for their respective retail outlets, but that refiners should be required to provide labels for their own dealers or company-owned stations.(135) Another comment argued that the last jobber in the chain of distribution would be the most appropriate party to provide labels to retailers.(136) Comments were split evenly in favor and against use of retail dealer associations, the point of disagreement being whether the associations could actually be helpful.(137)

Some industry members suggested that if refiners supplied the posting labels to retailers, the refiners' cost should be reimbursed by retailers. Some of these comments preferred retailers to provide and pay for labels.(138) Other industry members argued that retailers should supply their own labels at their own expense.(139) Some comments suggested that the Commission should make labels available, at government expense, perhaps through local post offices.(140)

Phillips noted that the supplier of gasoline should be responsible for providing labels, because the refiners are not always the person who determines the octane rating, as in the case of exchange agreements between refiners. Suppliers should supply labels without cost to the retailer, since the administrative costs of collecting for labels on a "cost" basis would not be justified.(141)

The Commission has concluded that the statutory requirement to post imposes a burden of obtaining labels. Although refiners usually know the octane rating of the gasoline they are supplying, and thus can buy labels in bulk quantities at low cost (estimated at between 4 and 7 cents per label),(142) they often do not know where their product is going, and cannot reasonably predict who will receive labels, or if they will ever be used. In addition, a requirement that refiners or distributors supply labels would yield unreasonable results when the retailer being supplied already has enough labels showing the octane number of the gasoline being transferred. Therefore, the rule is silent as to assignment of the burden of supplying labels.

Given the uncertainties and complexities in the gasoline marketplace, the Commission believes that an inflexible requirement upon any one industry group to supply or pay for labels would too often yield inequitable results. The Commission believes that the mechanics of label supply and cost allocation can be worked out through a variety of marketplace means, and that this desirable flexibility would be stifled by a rule prescribing only one approach. In some situations, it may be most expedient for a refiner to purchase labels and supply them to its own dealers at no cost. Or, in the case of a refiner making gasoline available to an independent retail chain, the refiner could have a supply of labels available to the retailers at cost when needed. In cases involving independent retailers who purchase gasoline from whatever source is available, it would perhaps be more appropriate for them to purchase labels from a third-party source. Consequently, the rule allows the marketplace to decide the question of who will bear the burden of supply and/or paying for labels in individual situations.

6. *Recordkeeping.* Under Section 306.7 of the proposed rule, records of tests performed by or for importers and refiners and used as a basis for certification had to be kept on file for 3 years and be available for inspection by persons authorized to enforce PMPA or the rule. Since testing by distributors or retailers was not an option under the proposed rule, these industry members were not required to keep test records.

Section 306.23 of the proposed rule required distributors to keep records of all delivery invoices received and used as a basis of certification. These records were to be kept on file by distributors for 1 year and made available for inspection by authorized persons.

Section 306.23 of the proposed rule also required retailers to keep records of delivery invoices used as a basis for posting. These records had to be kept for 1 year and made available for inspection by authorized persons.

The FEDERAL REGISTER notice of the proposed rule requested comments on current recordkeeping practices in the industry, including whether the proposed recordkeeping provisions would permit tracing of specific quantities of gasoline back through the chain of distribution, and what additional information should be added to the required records to facilitate tracing.

a. *Tracing.* Industry comments indicated that tracing specific quantities of gasoline can be done only in certain situations.(143) Three refiners ex-

pressed the opinion that such tracing is possible, although not simple.(144) According to Union Oil, most members of the petroleum industry can tract their gasoline back from the retailer to the refiner with a little detective work, because of the records required in connection with state excise taxes.(145)

Some industry members commented that complete tracing could be done under some circumstances, but was impossible under others.(146) One industry practice which makes tracing difficult is the commingling of different gasolines in terminal storage facilities and in transfer facilities such as trucks, barges, and pipelines.(147)

Mobile suggested that tracing would be particularly difficult with respect to independent and non-branded dealers, who comprise over ⅓ of the industry.(148)

Some industry members expressed the opinion that it might be impossible to trace gasoline, due to the practice of using common storage facilities.(149) Derby stated that the only situation in which the refiner can accurately trace its product to a retailer is when the refiner transports the gasoline to its own retail outlet.(150)

The Commission believes that, notwithstanding the occasional difficulties of tracing gasoline through the chain of transfer, tracing can still be done regularly in many cases. For this reason, and because tracing will assist in enforcement of the rule, the final rule retains the proposed recordkeeping requirement.

b. *Retention time.* Some refiners indicated that they keep testing records for at least the period specified in the proposed rule. Others, however, commented that a 3-year retention would be unnecessary and unduly burdensome.(151) The National Petroleum Refiners Association said that it would be inconsistent to require refiners to retain test records for 3 years, while requiring distributors and retailers to keep transfer records for only 1 year. NPRA pointed out that when transfer records become unavailable, test information becomes useless for the purpose of assigning responsibility for octane deficiencies.(152)

The record clearly suggests that specific quantities of gasoline sometimes can be traced through the chain of distribution, thus justifying the practice of recordkeeping. The Commission believes that it is inconsistent and unnecessary to require refiners and importers to keep their records for 3 years, while requiring that records of transfers be kept for only 1 year by distributors and retailers. Also, given the perishable nature of gasoline, the 1-year retention period seems reasonable. Accordingly, the final rule changes the retention time from 3 years to 1 year for all recordkeeping.(153)

Consistent with the provision that distributors and retailers be permitted the option of testing gasoline, records of their octane rating determinations must be kept for 1 year under the final rule.(154)

FOOTNOTES

1. PMPA Section 203(c)(1).
2. PMPA Section 203(d)(1).
3. 16 CFR 422.
4. *See* detailed discussion of the (R+M)/2 formula, Section I, D, *infra.*
5. *National Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672 (D.C. Cir., 1973) *cert. denied* 415 U.S. 951 (1974).
6. The Commission believes that Congressional passage of PMPA obviated the necessity for an environmental impact statement regarding the instant rule.
7. *See* S. Rep. No. 95-731, 95th Cong., 2d Sess. 21 (1978); H.R. Rep. No. 95-161, 95th Cong., 2d Sess. 18 (1978). The Senate report accompanying the legislation discussed the legal challenges to the Commission's trade regulation rule and pointed out that the rule still had not become effective.
8. The Commission believes that a repeal of the rule was effected by enactment of the PMPA, and the Commission announced that fact by publication in the FEDERAL REGISTER.
9. 10 CFR 212.129.
10. B-VI/21. On February 28, 1979, at p. 11237 of the FEDERAL REGISTER, the Department of Energy published a notice of its intention to terminate the octane posting requirement of its rule, effective on the effective date of the Commission's present octane rule.

NOTE.—All evidence in the rulemaking record of this proceeding was assigned docket number (202-1-) and a letter prefix that designates the type of evidence. The letter prefixes are as follows:

202-1-A Public notices, petitions, motions, orders, and other official documents not otherwise categorized;

—B Commission staff submissions (initial staff report and submissions, materials and data placed on the record by the Commission staff);

—C Consumer comments (individual and organizations);

—D Government submission (federal, state, and local);

—E General industry comments;

—F Scientific/academic comment (submission of independent experts, technical, scientific and academic comment);

—G Prepared hearing statements and exhibits and written materials;

—H Public hearing: (a) transcript, (b) exhibits, (c) written questions, (d) rebuttal submissions;

—I Final staff report and comments thereon;

—J Statement of basis and purpose, final rule and other Commission actions;

—K Miscellaneous submissions and comments (not otherwise categorized);

—L Court documents.

When evidence in the record is referenced, the document category will be listed, followed by a hyphen and the document number, followed by a slash and the internal page at which the cited statement appears. In the case of transcripts, no document number appears. If the citation is to an entire document, rather than to a particular page, the letter prefix and the document number are separated by a hyphen. For example:

C-4/2 refers to internal page 2 of consumer comment under number 4.

H(a)/203 refers to page 203 of the public hearing transcripts.

In many cases, references will be made to the Staff Report (202-1-I). Such references will be simply to "Staff Report," and the page(s) or footnotes of interest.

11. *Id. See* Staff Report, pp. 2-3.
12. PMPA Section 201(5): The term "refiner" means any person engaged in (A) the refining of crude oil to produce automotive gasoline; or (B) the importation of automotive gasoline.
13. PMPA Section 202(a)(2).
14. PMPA Section 201(16): The term "distributor" means any person who receives gasoline and distributes such gasoline to another person other than the ultimate purchaser.
15. PMPA Section 202(b)(1).
16. PMPA Section 201(4): The term "gasoline retailer" means any person who markets automotive gasoline to the general public for ultimate consumption.
17. PMPA Section 202(c).
18. PMPA Sections 201(1) & (2), 202(a)(1).
19. ASTM D2699 75, Standard Test Method for Knock Characteristics of Motor Fuels by Research Method: ASTM D2700 75, Standard Test Method for Knock Characteristics of Motor and Aviation Fuels by the Motor Method. Both test methods are referenced and discussed in ASTM D439 78, Standard Specifications for Automotive Gasoline.
20. ASTM D439 78 at 7.
21. *Id.*
22. *Id.*
23. *Id.*
24. PMPA Section 201(1).
25. PMPA Section 203(c)(3). The Act states that such a rule must be prescribed "on the record," under, 5 U.S.C. 556, 557 (1970). PMPA Section 203(d)(2). The stringent deadline placed on the effective date of a certification and posting rule has made it impracticable to consider in this proceeding any procedure other than the (R+M)/2 method. Pursuant to PMPA, different, lengthier procedures than those followed here would have been required for appropriate consideration of other possible formulae for determining octane levels. Consequently, the Commission has prescribed use of the (R+M)/2 formula in the rule. (Section 306.4(b)).
26. Section 306.1.
27. The Commission can enforce the rule by bringing a civil action in Federal District Court against any violator, with the exception of gasoline retailers. Section 203(e) of PMPA provides that to prove a violation against a retailer, the Commission must show that the retailer had actual knowledge of the violation committed, as opposed to "implied" knowledge, which is required by section 5(m)(1)(A) of the Federal Trade Commission Act.
28. The rule retains the term "determine" used in Section 202(a)(1) of PMPA. This gives industry the flexibility to use methods other than the three enumerated, such as relying on prior experience or data, with spot checking for assurance of quality.
29. PMPA Section 202(a)(1).
30. Section 306.4(b); PMPA Sections 201 (1) and (2).

31. Section 306.7(a).
32. Section 306.9(c).
33. For distributors, Section 306.7(a); for retailers, Section 306.9(c).
34. Section 306.5.
35. *Id.*
36. Section 306.8.
37. For refiners and importers, Section 306.5(a); for distributors, Section 306.7(a).
38. For refiners and importers, Section 306.5(b); for distributors, Section 306.7(b).
39. For refiners and importers, Section 306.5 (a)(4) and (b); for distributors, Section 306.7(a).
40. Section 306.9(a).
41. Section 306.9(c).
42. *Id.*
43. Section 306.9(b).
44. Section 306.9(d).
45. *Id.*
46. Section 306.11(a).
47. *Id.*
48. Section 306.11(b).
49. Section 306.11(a).
50. Section 306.11(c).
51. Section 306.11(f).
52. *Id.*
53. Section 306.11(g).
54. Section 306.9(a).
55. Sections 306.9(c), 306.11(b).
56. Section 306.6.
57. *Id.*
58. *Id.*
59. Section 306.8.
60. Section 306.10.
61. PMPA section 204.
62. To learn the nature and extent of present state involvement in this area, the Commission solicited information from the states concerning their programs, and received 37 responses. *See* Staff Report, 9-12.
63. 15 U.S.C. 45(m)(1)(A).
64. *See* note 12, *supra.*
65. *See* note 16, *supra.*
66. *See* note 14, *supra.*
67. Staff Report, 9; section 306.1: "You are covered if you take title to gas and you are covered if you just take custody of gas."
68. Environmental Protection Agency, D-3/1.
69. *See* note 62, *supra.*
70. PMPA section 201(2).
71. Despite the statutory restriction, representatives of ASTM testified that because ASTM standards are revised at least once every 5 years to account for technological advances, the rule should not continue to prescribe an outdated version of the standards, but should be sufficiently flexible to allow for incorporation of ASTM changes in the standards. *See* Staff Report, p. 13. However, *see* I-18/2, for a contrary view.
72. This was suggested by the National Petroleum Refiners Association, E-14/2.
73. Staff Report, 14.
74. *See* comment of Husky, E-18/3.
75. PMPA section 202(b)(2) and section 202(c)(2).
76. PMPA section 203(d)(1).
77. For a detailed discussion of the evidence relating to retailer and distributor testing, *see* Staff Report, 30-33.
78. C-3/2.
79. E-10/3-4.
80. H(a)/111-112.
81. This formula is prescribed as the average, weighted by volume, of the octane ratings of the different gasolines in the mixture.
82. Navajo, E-27/4.
83. Society of Independent Gasoline Marketers of America, K-6/3.
84. Derby, E-24/3; Mobil, E-12/1.
85. *See* section 306.7(a) (for distributors); section 306.9(c) (for retailers).
86. For a detailed discussion of the evidence relating to blending and the weighted-average formula, *see* Staff Report, 33-38.
87. The evidence is that such blending rarely occurs in the industry. *See* Staff Report, 33-38.
88. E-21/1-2.
89. Exxon, E-3/2.
90. E-6/5.
91. H(a)/163-69. However, Mr. Sidney Andrews, Director of the Division of Standards of the Florida Department of Agriculture and Consumer Services, disagreed as to the degree of variability found in the supply of gasoline in the market, at least in Florida.
92. C-3/2.
93. PMPA section 203(c)(4).
94. Section 306.7(a) (for distributors); section 306.9(c) (for retailers).
95. PMPA section 202(a)(2).
96. *Id.*
97. PMPA section 202(b).
98. PMPA section 202(b)(2); *see* discussion of distributor testing, *supra.*
99. Proposed rule, section 306.0(n).
100. *Id.* section 306.10 (a) and (b).
101. *Id.* section 306.10(c). For detailed discussion of the evidence relating to certification, *see* Staff Report, 15-21.
102. Staff Report, 16, note 51.
103. For a detailed discussion of evidence relating to different types of transfers and the documentation involved, *see* Staff Report, 15-18.
104. Byrne, H(a)/144-45.
105. Price, H(a)/35, 36, 45.
106. Gulf, E-15/1; Mobil, E-12/9.
107. *See* Staff Report, 20-21.
108. For refiners and importers: "I certify that the octane rating specified on this delivery invoice is consistent with my determination of the octane rating." For distributors, the statement ends with "• • • consistent with the octane rating on the delivery invoice or invoices which accompanied the transfer of this gasoline."
109. Price, H(a)/42.
110. Staff Report, 19, note 65.
111. Staff Report, 19, note 66.
112. Comments on label placement are discussed in the Staff Report at pages 42-45.
113. I-3; I-19/1 (late comment on Staff Report).
114. *See* I-27/1-2. The National Congress of Petroleum Retailers pointed out that "as near as possible" could be extremely limiting, if interpreted literally. Thus the final language: "as near as reasonably practical".
115. Proposed rule, section 306.20(b).
116. Proposed rule, section 306.20(a)(1).
117. Proposed rule, section 306.21 (b) and (e).
118. For a detailed discussion of evidence relating to what number should be posted, *see* Staff Report, 45-52.
119. Staff Report, 45-46.
120. *Id.*
121. Staff Report, 49-50.
122. Mobil, E-12/12.
123. Staff Report, 53.
124. For a detailed discussion of the evidence relating to other information on the label, *see* Staff Report, 52-57.
125. The Center for Auto Safety's survey of manuals was made in 1978. See G-3/Statement, p. 6 and Exhibit 3.
126. For a detailed discussion of evidence relating to label specification, *see* Staff Report, 64-67.
127. Maryland, Arkansas, Connecticut and California. *See* B-XVI.
128. Price, H(a)/30.
129. E-2/3.
130. Ariston, F-1/1.
131. E-12/11-12, Addendum A-1.
132. E-9/4.
133. Sears, H(d)3/2. For a detailed discussion of the evidence relating to supply of labels, *see* Staff Report, 22-24, 40-41, 60-61.
134. Clark, E-17/3.
135. Staff Report, 24, notes 85 and 86.
136. Navajo, E-27/2.
137. Marathon, E-8/4; Derby, E-24/3.
138. Staff Report, 23, notes 75 and 76.
139. *Id.*, note 78.
140. *Id.*, 24, note 81.
141. Phillips, E-20/4.
142. K-7/1.
143. For a detailed discussion of tracing specific quantities of gasoline, *see* Staff Report, 26-28.
144. Staff Report, 26, note 95.
145. Byrne, H(a)/120.
146. Staff Report, 27, note 98.
147. *See* for example, comment of Tenneco, E-26/1.
148. E-12/7.
149. Staff Report, 27, notes 102 and 103.
150. E-24/3-4.
151. For a discussion of the evidence relating to retention time, *see* Staff Report, 28, 62.
152. E-14/2.
153. For refiners and importers, section 306.6; for distributors, section 306.8; for retailers, section 306.10.
154. For distributors, section 306.8; for retailers, section 306.10.

Accordingly, pursuant to Section 203(c) of the Petroleum Marketing Practices Act and § 1.26(d) of the Commission's Rules of Practice (16 CFR 1.26(d), 16 CFR Chapter I, Subchapter C is amended by adding new Part 306 reading as follows:

## PART 306—OCTANE POSTING AND CERTIFICATION

GENERAL

Sec.
306. 0 What this rule does.
306. 1 Who is covered.
306. 2 Stayed or invalid parts.
306. 3 Preemption.

DUTIES OF REFINERS, IMPORTERS, AND PRODUCERS

306. 4 Octane rating.
306. 5 Certification.
306. 6 Recordkeeping.

DUTIES OF DISTRIBUTORS

306. 7 Certification.
306. 8 Recordkeeping.

DUTIES OF RETAILERS

306. 9 Octane posting.
306. 10 Recordkeeping.

LABEL SPECIFICATIONS

306. 11 Labels.

AUTHORITY: Pub. L. 95-297, 92 Stat. 322 (15 U.S.C. 2801, et seq.)

## GENERAL

### § 306.0 What this rule does.

This rule deals with the certification and posting of octane ratings in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. It applies to persons, partnerships, and corporations. If you are covered by this regulation, breaking any of its rules is an unfair or deceptive act or practice under section 5 of that Act. You can be fined up to ten thousand dollars each time you break a rule.

### § 306.1 Who is covered.

You are covered by this rule if you are a refiner, importer, producer, distributor, or retailer of gasoline. Gasoline, in this rule, means automotive gasoline.

### § 306.2 Stayed or invalid parts.

If any part of this rule is stayed or held invalid, the rest of it will stay in force.

### § 306.3 Preemption.

The Petroleum Marketing Practices Act (PMPA) is the law that instructs the FTC to enact this rule. Section 204 of PMPA provides:

> To the extent that any provision of this title applies to any act or omission, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to such act or omission, unless such provision of such law or regulation is the same as the applicable provision of this title.

## DUTIES OF REFINERS, IMPORTERS AND PRODUCERS

### § 306.4 Octane rating.

(a) If you are a refiner, importer, or producer, you must determine the octane rating of all gasoline before you transfer it. You can do that yourself or through a testing lab.

(b)(1) To find the octane rating, add the research octane number and the motor octane number and divide by two, as explained by the American Society for Testing and Materials (ASTM) in ASTM D 439-78, entitled "Standard Specifications for Automotive Gasoline." To determine the research octane number, use ASTM standard test method D 2699-75, and to determine the motor octane number, use ASTM standard test method D 2700-75.

(2) If ASTM changes these standards, there will be a 30-day comment period, beginning after the Commission publishes the change in the FEDERAL REGISTER. During this time, Commission staff or any person affected by the change may petition the Commission not to adopt the change because it is a change in the procedures for determining octane ratings, or to extend the length of time of the grace period that follows the comment period. If, based on comments, the Commission decides to permit incorporation of the change into the rule, the change will become effective 60 days after expiration of the comment period, unless this period is extended by the Commission. If the Commission decides not to permit automatic incorporation, formal procedures may be initiated to evaluate the change.

### § 306.5 Certification.

In each transfer you make to anyone who is not a consumer, you must certify the octane rating of the gasoline consistent with your determination. You can do this in either of two ways:

(a) Include a delivery ticket with each transfer of gasoline. It may be an invoice, bill of lading, bill of sale, terminal ticket, delivery ticket, or any other written proof of transfer. It must contain at least these four items:

(1) Your name;

(2) The name of the person to whom the gasoline is transferred;

(3) The date of the transfer;

(4) The octane rating. This may be rounded off to a whole or half number equal to or less than the number determined by you.

(b) Give the person a letter or other written statement. This letter must include the date, your name, the other person's name, and the octane rating of any gasoline you will transfer to that person from the date of the letter onwards. The octane rating may be rounded to a whole or half number equal to or less than the number determined by you. This letter of certification will be good until you transfer gasoline with a lower octane rating. When this happens, you must certify the octane rating of the new gasoline, either with a delivery ticket or by sending a new letter of certification.

(c) When you transfer gasoline to a common carrier, you must certify the octane rating of the gasoline to the common carrier, either by letter or on the delivery ticket or other paper.

### § 306.6 Recordkeeping.

You must keep records of how you determined octane ratings for one year. They must be open for inspection by Federal Trade Commission and Environmental Protection Agency staff members, or by people authorized by FTC or EPA.

## DUTIES OF DISTRIBUTORS

### § 306.7 Certification.

If you are a distributor, you must certify the octane rating of the gasoline in each transfer you make to anyone who is not a consumer.

(a)(1) If you do not blend the gasoline with other gasoline, you must certify consistent with the octane rating certified to you. If you blend the gasoline with other gasoline, you must certify consistent with your determination of the average, weighted by volume, of the octane ratings certified to you for each gasoline in the blend, or consistent with the lowest octane rating certified to you for any gasoline in the blend. Whether you blend gasoline or not, you may choose to certify the octane rating of the gasoline consistent with your determination of the octane rating according to the method in section 306.4.

(2) In all cases above, the octane rating may be rounded to a whole or half number equal to or less than the number certified to you or determined by you.

(b) You may certify either by using a delivery ticket with each tansfer of gasoline, as outlined in § 305.5(a), or by using a letter of certification, as outlined in § 306.5(b).

(c) When you transfer gasoline to a common carrier, you must certify the octane rating of the gasoline to the common carrier, either by letter or on the delivery ticket or other paper. When you receive gasoline from a common carrier, you must also receive from the common carrier a certification of the octane rating of the gasoline, either by letter or on the delivery ticket or other paper.

### § 306.8 Recordkeeping.

You must keep for one year any delivery tickets or letters of certification on which you based your octane rating certifications. You must also keep for one year records of any octane rating determinations you made according to § 306.4. They must be open for inspection by Federal Trade Commission and Environmental Protection Agency staff members, or by persons authorized by FTC or EPA.

## DUTIES OF RETAILERS

### § 306.9 Octane posting.

(a) If you are a retailer, you must post the octane rating of all gasoline you sell to consumers. You must do this by putting at least one label on each face of each gasoline dispenser through which you sell gasoline. If you are selling two or more kinds of gasoline with different octane ratings from a single dispenser, you must put separate labels for each kind of gasoline on each face of the dispenser.

(b)(1) The label, or labels, must be placed conspicuously on the dispenser so as to be in full view of consumers and as near as reasonably practical to the price per gallon of the gasoline.

(2) You may petition for an exemption from the placement requirements

by writing the Secretary of the Federal Trade Commission. You must state the reasons why you want the exemption.

(c) If you do not blend the gasoline with other gasoline, you must post consistent with the octane rating certified to you. If you blend the gasoline with other gasoline, you must post consistent with your determination of the average, weighted by volume, of the octane ratings certified to you for each gasoline in the blend, or consistent with the lowest octane rating certified to you for any gasoline in the blend. Whether you blend gasoline or not, you may choose to post the octane rating of the gasoline consistent with your determination of the octane rating according to the method in § 306.4. In all cases above, the octane rating must be shown as a whole or half number equal to or less than the octane rating certified to you or determined by you.

(d)(1) You must maintain and replace labels as needed to make sure consumers can easily see and read them.

(2) If the labels you have are destroyed or are unusable or unreadable for some unexpected reason, you can satisfy the law by posting a temporary label as much like the required label as possible. You must still get and post the required label without delay.

(e) When you receive gasoline from a common carrier, you must also receive from the common carrier a certification of the octane rating of the gasoline, either by letter or on the delivery ticket or other paper.

**§ 306.10 Recordkeeping.**

You must keep for one year any delivery tickets or letters of certification on which you based your posting of octane ratings. You must also keep for one year records of any octane rating determinations you made according to section 306.4. These records may be kept at the retail station, or at another, reasonably close location. They must be open for inspection by Federal Trade Commission and Environmental Protection Agency staff members or by persons authorized by FTC or EPA.

LABEL SPECIFICATIONS

**§ 306.11 Labels.**

All labels must meet the following specifications:

(a) *Layout.* The label is 3" wide x 2½" long. The illustrations appearing at the end of this rule are prototype labels that demonstrate the proper layout. Helvetica type is used throughout except for the octane rating number which is in Franklin gothic type. Spacing of the label is ¼" between the top border and the first line of text, ⅛" between the first and second line of text, ¼" between the octane rating and the line of text above it. All text and numerals are centered within the interior borders.

(b) *Type size and setting.* The Helvetica series is used for all numbers and letters with the exception of the octane rating number. Helvetica is available in a variety of phototype setting systems and by linotype. The line "MINIMUM OCTANE RATING" is set in 12 point Helvetica Bold, all capitals, with letterspace set at 12½ points. The line "(R+M)/2 METHOD" is set in 10 point Helvetica Bold, all capitals, with letterspace set at 10½ points. The octane number is set in 96 point Franklin gothic condensed with ⅛" space between the numbers.

(c) *Colors.* The basic color on all labels is process yellow. All type is process black. All borders are process black. Both colors must be non-fade.

(d) *Contents.* The contents are shown in the illustration. The proper octane rating for each gasoline must be shown. No marks or information other than that called for by this rule may appear on the label.

(e) *Special label protection.* All labels must be capable of withstanding extremes of weather conditions for a period of at least one year. They must be resistant to gasoline, oil, grease, solvents, detergents, and water.

(f) *Illustrations of labels.* Labels should meet the specifications in this section, and should look like these examples, except the black print should be on a yellow background.

By direction of the Commission.

CAROL M. THOMAS,
*Secretary.*

[FR Doc. 79-9620 Filed 3-29-79; 8:45 am]

[6750-01-M]

## FEDERAL TRADE COMMISSION

[16 CFR Part 306]

## OCTANE POSTING AND CERTIFICATION RULE

### Request for Comments on Coverage of "Producers"

AGENCY: Federal Trade Commission.

ACTION: Invitation for public comment.

SUMMARY: Today the Federal Trade Commission has in this issue of the FEDERAL REGISTER published its rule on the certification and posting of octane ratings. The Commission has determined that, consistent with the Congressional intent for comprehensive coverage in Title II of the Petroleum Marketing Practices Act, "producers" should be included among those covered by the Octane Posting and Certification Rule. Accordingly, the rule covers producers. "Producers" refers to that industry group that purchases component elements and combines them to produce automotive gasoline, rather than producing gasoline by refining it from crude oil.

Because of the limited number of comments received regarding the inclusion of producers under the rule, the Commission is offering an opportunity for comments on the Commission's decision to include this industry group in the octane certification scheme.

DATES: Comments must be received on or before April 30, 1979.

ADDRESSES: Send comments to Mr. Carol M. Thomas, Secretary, Federal Trade Commission, Washington, D.C. 20580. If possible also send a copy to Mr. James G. Mills, Attorney, Division of Energy and Product Information, Federal Trade Commission, Washington, D.C. 20580. The envelope should be marked "Octane Rulemaking".

FOR FURTHER INFORMATION CONTACT:

James G. Mills, (202) 724-1967, Division of Energy and Product Information, Federal Trade Commission, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: The Federal Trade Commission has promulgated a rule in this issue under the authority of the Petroleum Marketing Practices Act that requires the certification and posting of the octane ratings of automotive gasoline. The rule describes a uniform method for certification by those who distribute gasoline and for posting by those who sell directly to consumers. The rule covers all members of the automotive gasoline industry including refiners, importers, producers, distributors and retailers.

Producers are a small group within the industry who are the originating sellers of automotive gasoline but who do not either import or receive gasoline, or refine if from crude oil. Rather, they purchase component parts and combine them to produce finished gasoline. The Commission, in § 306.1 of its rule, covered producers along with all other members of the automotive gasoline industry who market gasoline for ultimate sale to consumers. This coverage is consistent with Congressional intent to provide octane purchasing information to all consumers. Such information is vital to consumers wishing to make informed gasoline purchases, and is required by Congress to protect consumers and conserve energy.

By direction of the Commission.

CAROL M. THOMAS,
*Secretary.*

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